FILED
APR 15 1964
JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 1009

In re Suspension of
MAURICE W. TINDALL
from Judicial Office.

In re Suspension of
GLENN W. EVANS
from Judicial Office.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the
State of California

GREGORY S. STOUT,
E. JOHN KLEINES,
220 Bush Street,
San Francisco 4, California,
Counsel for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Citation to opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement of the case	3
Reasons for granting the writ	5
1. Conflict of decision—procedural due process	5
2. Conflict of decision on equal protection of the laws	9
Conclusion	12

Table of Authorities Cited

Cases	Pages
Baker v. Carr, 369 U.S. 186	8
Bennett v. Wilson, 133 C. 379	10
Bradley v. Fisher, 13 Wall. 355	9
Coppedge v. United States, 369 U.S. 438, 8 L.ed. 21	12
Douglas v. California, 372 U.S. 353, 9 L.ed.2d 811	12
Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.ed. 629	8
Draper v. Washington, 372 U.S. 487, 9 L.ed.2d 899	12
Estate of Hancock, 156 C. 804	10
Estate of Pussey, 177 C. 367	10
Estate of Wise, 34 C.2d 376	10
Ex Parte Sawyer, 124 U.S. 200	8
Ex Parte Virginia, 100 U.S. 339	5, 8, 9
Fay v. Noia, 373 U.S. 391, 9 L.ed.2d 837	11
Fray v. Blackburn, 3 Best & S 576	9
Gideon v. Wainwright, 372 U.S. 335	9
Griffin v. Illinois, 35 U.S. 12, 100 L.ed. 891	12
Hurtado v. California, 110 U.S. 516	5, 7
In re Tindall and Evans, 60 A.C. 445	6, 7
Kaufmann v. Calif. Min. etc. Synd., 16 C.2d 90	10
Kennard v. Louisiana, 92 U.S. 480	8
Lane v. Brown, 372 U.S. 427, 9 L.ed.2d 892	12
Mapp v. Ohio, 367 U.S. 643	9
McKane v. Durston, 153 U.S. 684	11
Ohio Ex Rel: Bryant v. Akron, etc., 281 U.S. 74	8, 11
Palko v. Connecticut, 302 U.S. 319	7, 9
Phelan v. Superior Court, 35 C.2d 363	10
Randall v. Brigham, 7 Wall. 523	9
Reetz v. Michigan, 188 U.S. 505	8
Salinas v. Lee, 217 C. 252	10

Pages

Taafe v. Downes, 3 Moore P.C. 54 9
Twining v. New Jersey, 211 U.S. 78 ..... 5, 7

Codes

California Code of Civil Procedure:
Section 1908 3
Section 1909 3
Section 1963(16) 3, 7, 10
Section 1963(17) 3

California Penal Code:
Section 170 3
Section 182 3
Section 182(1) 3

28 U.S.C. 1257(3) 2

Constitutions

California Constitution:
Article III, Section 3 3
Article IV, Section 4 ..... 2, 4, 8
Article VI, Section 10 3
Article VI, Section 10a 3, 4, 6
Article VI, Section 10b 3
Article VI, Section 11 3

United States Constitution:
Amendment XIV 9, 11
Amendment XIV, Section 1 ..... 2, 4

Texts

30A Am. Jur., Judges, Section 86, p. 55 9

33 Corpus Juris, Judges, Section 33, p. 908 9

48 Corpus Juris Secundum, Judges, Section 271, p. 1038 .. 9

Hawkins, A Treatise of the Pleas of the Crown, 1739, London:
Book I, Chap. 72, Conspiracy, Sections 6 and 7 ..... 8, 9
Book II, Chap. 13, Arrest of Publick Officers, Section 20 8, 9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No.

In re Suspension of MAURICE W. TINDALL from Judicial Office.
In re Suspension of GLENN W. EVANS from Judicial Office.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California

Petitioners pray that a writ of *certiorari* issue to review the judgment of the Supreme Court of California entered in the above entitled case on November 18, 1963.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of California is reported in 60 A.C. 445, 34 Cal. Rptr. 849, and is attached hereto as Appendix B, pp. xi-xiv.

JURISDICTION

The judgment of the Supreme Court of California was entered November 18, 1963. No petition for rehearing was filed. Application to this Court to extend Petitioners' time within which to file this petition to April 16, 1964, was made on February 4, 1964. Jurisdiction is invoked pursuant to 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Does the refusal of the Supreme Court of California to permit petitioners to collaterally attack an adverse judgment in another judicial proceeding deny them Fourteenth Amendment procedural due process?

2. If California courts permit broad inquiry into the absence of jurisdiction over the subject matter or of the person at all stages of any civil or criminal proceeding, is it an invidious discrimination against these petitioners to refuse to permit them to collaterally attack their criminal convictions by the presentation of evidence showing that their acts were *ex officio* to their judicial position and subject thereby to the rule of judicial immunity, thus denying to petitioners Fourteenth Amendment equal protection of the laws?

STATUTES INVOLVED

The constitutional and statutory provisions herein involved are Article IV, Section 4, and Amendment XIV, Section 1 of the Constitution of the United

States; Article III, Section 3, Article VI, Sections 10, 10a, 10b and 11 of the Constitution of California; Sections 170 and 182 of the California Penal Code and Sections 1908, 1909 and 1963, Subdivisions 16 and 17 of the California Code of Civil Procedure. They are printed in Appendix A hereof, pp. i-x.

STATEMENT OF THE CASE

Petitioners Tindall and Evans were respectively Judges of the Justice Court for the Anderson Judicial District and the Round Valley Judicial District in the County of Mendocino, State of California. They and two others, not judges, were tried by the Superior Court of Mendocino County and convicted on two counts of felony conspiracy; in count one to "pervert and obstruct justice and the due administration of the law" in violation of §182, subdivision 5 of the Penal Code and in count two with a conspiracy to commit the substantive crime of misdemeanor to maliciously procure a warrant of arrest in violation of Penal Code §170. Penal Code §182, subdivision 1, in part provides that it is a felony if two or more persons conspire to commit any crime. (Appendix A, pp. vii and viii.)

Subsequent to their trial court convictions, petitioners received suspended sentences, probation and were fined. Whereupon an Order to Show Cause was issued out of the Supreme Court of California as to why petitioners ought not to be suspended from their

judicial positions pending final judgment on their convictions. In this regard the Court below acted in reliance upon the language of Article VI, Section 10a of the Constitution of California. (Appendix A, pp. iii-iv.) Petitioners demurred to the Order to Show Cause, in effect declaring that the acts for which they were convicted were judicial in nature, subject thereby to the rule of judicial immunity and that their convictions were an unwarranted and unconstitutional invasion by the executive branch of the government of California (the Attorney General) into the independence of the judiciary in violation of the guaranty of a republican form of government by the United States to the several states (Article IV, Section 4), thereby denying to petitioners procedural due process as set forth in the first section of Amendment XIV. The Order to Show Cause and Petitioners' Return and Points and Authorities thereto are set forth in the Record filed with this Court at pages 14-45.

At oral argument before the Supreme Court of California, petitioners sought to present evidence at a later date in support of their contention that the acts for which they stood convicted all were judicial in nature and subject to the rule of judicial immunity. It was petitioners' claim that in the orderly administration of justice, they should be accorded such a right. By its opinion, page 447, the Supreme Court of California denied their request, in effect, holding that petitioners had been accorded such a right before the trial court and jury in wholly separate and distinct criminal proceedings.

REASONS FOR GRANTING THE WRIT

1. CONFLICT OF DECISION—PROCEDURAL DUE PROCESS

The rule and opinion of the court below is in conflict with many decisions of this Court which postulate due process and equal protection constitutional principles.

The California Supreme Court having initiated steps under the California Constitution to suspend petitioners from the exercise of their functions as justices of the peace pending appeal of their criminal convictions, must assume that there is a valid judgment against petitioners. This is a state judicial act (*Ex Parte Virginia*, 100 U.S. 339, and *Twining v. New Jersey*, 211 U.S. 78) premised upon a provision in a state constitution which petitioners assert denies them procedural due process (*Hurtado v. Calif.*, 110 U.S. 516). Their assertion may be parsed as follows:

(1) Petitioners claim that despite all overt manifestations of compliance with substantive and procedural due process requirements, the trial court was without jurisdiction over the subject matter of the cause. They assert that the acts for which they were found guilty as charged were judicial acts (*Ex Parte Virginia*, 100 U.S. 339).

(2) If they were judicial acts performed by petitioners in the exercise of their judicial functions, they cannot be prosecuted therefor without destroying the independence of the judiciary in a republican form of government.

Petitioners tendered this issue to the Supreme Court of California by their traverse to the Supreme Court's Order to Show Cause. Thus they were entitled to a determination by the Supreme Court that the trial court did or did not have jurisdiction over the subject matter of their convictions. Such a determination can only be made upon enquiry into whether petitioners' acts were judicial and immune or were ministerial and prosecutable.

Despite petitioners' collateral attack upon the trial court's judgment, by its opinion (*In re Tindall and Evans*; 60 A.C. 445, 447), the Supreme Court assumed since the Superior Court had passed on its own jurisdiction that it could avoid deciding whether or not the Superior Court in fact did or did not have jurisdiction over the subject matter. Thus the Supreme Court failed to rule on the single issue posed by petitioners' traverse to the Order to Show Cause. And by such failure to rule, the order of the Supreme Court suspending petitioners from their judicial offices is itself devoid of jurisdiction. For unless the Supreme Court had jurisdiction over the litigation's subject matter, it may not act against petitioners because only upon there having been a valid judgment of conviction for a crime involving moral turpitude, not subject to collateral attack, can the Supreme Court of California suspend (Art. VI, Sec. 10a, Cal. Const., Appendix A, pp. ii and iii.)

The rationale of the decision of the Supreme Court of California is unclear. Because petitioners were granted a right to be heard by the Superior Court on

the exact issue raised herein and that Court adversely decided the issue, the Supreme Court held that there need be no further hearing (*In Re Tindall and Evans*, 60 A.C. 445, 447). Although unstated, the Supreme Court concluded as a matter of law (C.C.P. §1963 [16]) that the Superior Court's decision as to its jurisdiction was conclusive and therefore binding upon it. Petitioners assert that this is an evasion and denies their right to a full hearing to determine this issue.

To meet respondents' challenge, the Supreme Court of California perforce would have to enquire into and take evidence upon the issue as to whether respondents' acts were judicial or ministerial. For such purposes it could order counsel to abstract the record of petitioners' trial. In the alternative it could order up the trial record for examination, or it could appoint a referee to take testimony thereon and make findings. As an example, whether respondents issued one warrant of arrest or forty or did something else that is disputed, the Supreme Court must determine that the trial court had jurisdiction over the subject of respondents' trial as a *sine qua non* to making its order suspending petitioners from their judicial office. How it performs this function and what modality it employs among the several suggested by petitioners is a state matter (*Hurtado v. California*, 110 U.S. 516; *Twining v. New Jersey*, 211 U.S. 78; and *Palko v. Connecticut*, 302 U.S. 319).

But it is a federal matter when petitioners allege that by the action of the Supreme Court of California they were denied their federally guaranteed right to

a hearing to collaterally test the jurisdiction of the trial court to act against them. The right to notice and to a hearing is a procedural due process minimal accorded to all litigants (*Kennard v. Louisiana*, 92 U.S. 480; *Ex Parte Sawyer*, 124 U.S. 200; *Reetz v. Michigan*, 188 U.S. 505; Ohio ex. rel. *Bryant v. Akron Metropolitan Park District*, 281 U.S. 74. See also *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L.ed. 629, 645).

Accordingly, this Court is asked simply to direct the Supreme Court of California to set aside its order and judgment of November 18, 1963, whereby petitioners were suspended from their judicial posts, to take evidence and determine whether their acts were judicial or ministerial.

One further direction may be in order, that is to say if the California Supreme Court finds that petitioners' acts were judicial in nature within the meaning of *Ex Parte Virginia*, 100 U.S. 339, the California Court ought to be directed to enter its order of dismissal in favor of petitioners in all proceedings. For if their acts were wholly judicial, petitioners are immune from prosecution therefor.

The principle of judicial immunity, while not enforceable against the States through the guaranty section (Article IV, Section 4, Constitution of the U.S., Appendix A, p. 1; *Ohio Ex Rel. Bryant v. Akron, etc.*, 281 U.S. 74; and *Baker v. Carr*, 369 U.S. 186) is a fundamental principle of Anglo-American Common Law (Hawkins, A Treatise of the Pleas of the Crown, 1739, London, Book 1, Chapter 72, of

Conspiracy, Sections 6 and 7 and Book II, Chapter 13, of Arrest of Publick Officers, Section 20; *Taafe v. Downes,* 3 Moore P.C. 54; *Fray v. Blackburn,* 3 Best & S 576; 33 Corpus Juris, Judges, §33, p. 908; 48 Corpus Juris Secundum, Judges, §271, p. 1038; 30A Am. Jur., Judges, §86, p. 55; *Randall v. Brigham,* 7 Wall. 523; *Bradley v. Fisher,* 13 Wall. 355 and *Ex Parte Virginia,* 100 U.S. 339 particularly p. 348 of majority opinion by Strong, J. and pp. 369 and 370 of dissent by Field, J.).

While there are no express decisions thereon by this Court, surely the doctrine of judicial immunity from civil and criminal prosecutions is as much "implicit in the concept of well ordered liberty" (*Palko v. Connecticut,* 302 U.S. 319 p. 325) or "of the very essence of a scheme of ordered liberty" (*Palko v. Connecticut,* 302 U.S. 319, p. 325) as any of the Bill of Rights privileges and immunities that are incorporated through the 14th Amendment and made binding upon the States (*Gideon v. Wainwright,* 372 U.S. 335, the cited cases in footnote No. 4, 9 L.ed. 2d p. 803; *Mapp v. Ohio,* 367 U.S. 643).

---

2. CONFLICT OF DECISION ON EQUAL PROTECTION OF THE LAWS

The decision of the California Supreme Court is in conflict with many decisions of this Court which interpret the equal protection clause in the first section of the Fourteenth Amendment.

California, by statute and court opinion, has developed a comprehensive system of collateral attack on

judgments which is available to litigants in all forms of actions subject to certain restrictions which will be delineated herein. As has been previously described, §1963(16) C.C.P. (Appendix A, p. x) states a disputable presumption of California judgment validity. Case law permits collateral attack against such a judgment as well as direct attack. But as interpreted, petitioners' conspiracy convictions are conclusive in the Supreme Court of California against a collateral attack.

California appellate decisions distinguish between domestic and foreign judgments. So far as domestic, i.e. California, judgments are concerned, if the judgment roll is regular on its face, extrinsic evidence is inadmissible on collateral attack even though such evidence might conclusively show absence of jurisdiction. *Phelan v. Superior Court*, 35 C. 2d 363, 372, 374; *Salinas v. Lee*, 217 C. 252, 255; and *Bennett v. Wilson*, 133 C. 379, 385. See also *Estate of Wise*, 34 C. 2d 376, 382, and, *Kaufmann v. Calif. Min. etc. Synd.*, 16 C. 2d 90. As regards judgments from other States, absence of jurisdiction may be shown by extrinsic evidence. In this regard, *see Estate of Passey*, 177 C. 367, 373, and *Estate of Hancock*, 156 C. 804, 811.

Thus it might be stated that an adequate state ground exists to affirm the state court judgment and consequently to deny to petitioners their review by this Court if one is to follow California decisions and statutes making petitioners' convictions impervious to extrinsic evidence which would destroy the conclusiveness of the trial court's jurisdiction over the subject matter.

Petitioners, however, assert federal constitutionally protected rights where the "paramount interest is federal" (*Fay v. Noia*, 373 U.S. 391, 9 L.ed. 2d 837, 864). California is free to frame by its own rubrics of general application, a procedural system which may make its trial court judgments conclusive as to jurisdiction or other matters since there is no federally enforceable right of appeal through any portion of the first section of the 14th Amendment (*Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74; *McKane v. Durston*, 153 U.S. 684, 687). But such rubrics as California may employ may not be utilized to preclude petitioners from asserting federally created rights. California's rule invokes a forfeiture against petitioners. While this forfeiture may be only temporary if petitioners are successful in their direct attack against their convictions, still petitioners must hopefully gamble thereon. Petitioners assert that this Court ought "to refuse to defer to state procedural grounds, because they make burdensome the vindication of federal rights" (*Fay v. Noia*, 373 U.S. 391, 9 L.ed. 2d 837, 864, and the cases cited in footnote 41, L.ed. p. 865).

Fundamental to this discussion is the right to be heard, the right to present favorable evidence when one's life, liberty, property or reputation is at stake. California decisions discriminate against petitioners in that they say to them "Exhaust your direct attacks against what you allege to be wrongful criminal convictions. By our procedural rules we will deny to you what is everywhere recognized to be within the

concept of 'well ordered liberty', a right to be heard, even though you may be asserting federal constitutionally protected rights". In essence, the California decisions make petitioners second class litigants, as invidious a discrimination as that condemned by this Court in *Douglas v. California*, 372 U.S. 353, 9 L.ed. 2d 811, 813 and 814; *Lane v. Brown*, 372 U.S. 427, 9 L.ed. 2d 892, 897; *Draper v. Washington*, 372 U.S. 487, 9 L.ed. 2d 899, 906-907; *Coppedge v. United States*, 369 U.S. 438, 446, 8 L.ed. 21; and *Griffin v. Illinois*, 35 U.S. 12, 100 L.ed. 891.

CONCLUSION

Petitioners believe that the discretion of this Court ought to be exercised in their favor, and their petition for a writ of certiorari ought to be granted.

Dated, San Francisco, California,
April 3, 1964.

Respectfully,
GREGORY S. STOUT,
E. JOHN KLEINES,
Counsel for Petitioners.

(Appendices A and B Follow)